No. 16728

# United States Court of Appeals

for the Ninth Circuit

McCRAY MARINE CONSTRUCTION COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

# Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

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FRANK H. SCHMID,

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—2-12-60

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**[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]**

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## NAMES AND ADDRESSES OF COUNSEL

R. STUART THOMPSON,
6606 White-Henry-Stuart Building,
Seattle, Washington,

Attorney for Appellant.

CHARLES P. MORIARTY AND
GEORGE S. LUNDIN,
1012 U. S. Courthouse,
Seattle 4, Washington,

Attorneys for Appellee.

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 4686

McCRAY MARINE CONSTRUCTION CO.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## COMPLAINT

Comes Now the plaintiff and alleges as follows:

I.

That A. Walter McCray is now and was at the time herein mentioned a resident of King County doing business at Seattle under the name and style of McCray Marine Construction Company. That jurisdiction for this breach of contract action, for an amount less than $10,000, is conferred upon the above-entitled court by the provisions of Title 28, Section 1346 United States Code Annotated.

II.

That the McCray Marine Construction Co., hereafter referred to as the Contractor, entered into a contract on March 28, 1957 with the United States of America, hereafter referred to as the Government, to repair seaplane ramps "B" and "C" at the United States Naval Air Station, Whidbey Island, Oak Harbor, Washington, for a considera-

tion of $274,000, a copy of said contract being in the hands of the Government.

III.

That unnecessary delays caused by the Government are provided for in Section 9 (b) of the Standard Construction Contract as follows: "* * * All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work * * *" The only other part of the contract referring to delays is Section 5(c) and it provides only for an extension of time and no liquidated damage charges where the Contractor has been delayed for a number of causes, Section 5(c) providing as follows:

"The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: Provided, that the Contractor shall within 10 days from the beginning of any such delay, unless the

Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contract Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof."

IV.

That the Contractor commenced the repair work and by July 3, 1957, the composite wood and concrete slabs had been removed from seaplane ramp "B" and a letter was sent to the Government on July 3, 1957, advising them that ramp "B" was ready for inspection in accordance with Specifications 6639/56, page 19, paragraph 3.6 which reads as follows: "* * * Immediately following the removal of the existing composite slabs, the Government will perform an inspection of the substructures and will determine the locations of the new pile caps * * *" The repair work continued and by July 22, 1957, the composite wood and concrete slabs had been removed from seaplane ramp "C" and the Government was advised on July 22, 1957, by letter that ramp "C" was ready for inspection in accordance with the above-mentioned Specifications. On July 23, 1957, the Contractor advised the Government by letter that men and equipment would

be standing idly by after July 24, 1957, until either ramp "B" or "C" had been inspected. Due solely to the negligence of the Government the inspections were not made and the men and equipment were idle for sixteen (16) working days between July 25 and August 15, 1957, before the Contractor was able to resume working and eventually complete the repair work.

V.

That said Government was duly notified that damages had been incurred by the Contractor because of such delays but it has neglected to pay for the same or any part thereof.

VI.

Wherefore, the plaintiff prays for judgment against defendant in the sum of $8,049.50 with interest thereon from August 15, 1957, and costs.

/s/ R. STUART THOMSON,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed September 26, 1958.

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[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, represented by Charles P. Moriarty, United States Attorney for the Western District of Washington and George S. Lundin, Assistant United States Attorney for said district and answers plain-

tiff's complaint by admitting and denying and alleging as follows:

I.

Defendant denies knowledge or information sufficient to form a belief as to the allegations of the first sentence of plaintiff's complaint and denies the remainder of said paragraph.

II.

Defendant admits paragraph II of plaintiff's complaint.

III.

Defendant admits that the language quoted by plaintiff in paragraph III of the complaint appears in the contract in question; defendant denies the remainder of said paragraph.

IV.

Defendant admits that work was commenced as alleged in paragraph IV of plaintiff's complaint, that letters from the plaintiff were received indicating that ramps "B" and "C" would be available for inspection on 8 July, 1957, and 24 July, 1957, respectively and that the plaintiff's letter of 23 July, 1957, was received. Defendant denies plaintiff's allegation that there was any negligence of defendant or others in making required inspections. Defendant affirmatively alleges that plaintiff failed to abide by the work schedule which was furnished by plaintiff to defendant on or about 10 April, 1957, in accordance with Section 44 of the contract under which plaintiff has commenced his action and Sec-

tion 1.21 of the contract specifications. Defendant asserts that such failure of plaintiff to abide by said work schedule caused plaintiff's damages, if any.

Defendant further avers that inspection of the sub-structure of ramps "B" and "C" was accomplished with all due diligence after plaintiff had advised work was not being performed according to schedule by plaintiff. Defendant asserts that certain delays are inherent in underwater inspection and should have been foreseen by plaintiff.

V.

Defendant admits that it was notified of alleged damages incurred by plaintiff and that it has not paid for same. Defendant denies responsibility for plaintiff's delays and avers that plaintiff's damages, if any, were due to fault of plaintiff.

VI.

Defendant denies the entitlement of plaintiff to any and all amounts alleged in paragraph VI of the complaint.

VII.

As a First Affirmative Defense, Defendant alleges as follows:

That Section 57 of contract under which plaintiff is bringing his action reads in pertinent part as follows:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising

under this contract which is not disposed of by agreement shall be decided by the Chief of the Bureau of Yards and Docks, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Chief of the Bureau of Yards and Docks a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Chief of the Bureau of Yards and Docks shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the decision of the Chief of the Bureau of Yards and Docks. The term "Chief of the Bureau of Yards and Docks" as used herein shall include his duly appointed successor or his representative specially designated for this purpose." * * *

VIII.

That this case involves a question of fact which

should properly be considered administratively under Section 57 of the Contract in question, first by Chief of the Bureau of Yards and Docks (Navy Department) and thereafter on appeal, if any there be, by the Secretary of the Navy or his duly authorized representative for hearing of such appeals.

IX.

That plaintiff has failed to abide by the section of the contract in question set out above in paragraph VII and has failed to pursue his administrative remedies which he must do under the contract prior to commencing this action, that he is entitled to no relief in this action.

X.

As a Second Affirmative Defense, Defendant realleges paragraphs VII, VIII and IX of his answer and asserts that this Court has jurisdiction over neither the defendant nor this cause of action.

Wherefore defendant prays that plaintiff's complaint be dismissed with prejudice and that defendant have its cost herein.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GEORGE S. LUNDIN,
Assistant U. S. Attorney.

Certificate of service attached.

[Endorsed]: Filed January 15, 1959.

[Title of District Court and Cause.]

## MOTION FOR SUMMARY JUDGMENT

Defendant moves the above-entitled court to enter summary judgment for the defendant in the above-entitled case because plaintiff has failed to exhaust his administrative remedies and this court, accordingly, has no jurisdiction to try and determine the said matter. Defendant's motion is based upon pleadings in the case to date, the stipulation of the parties filed herein and the memorandum of authorities filed with this motion.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GEORGE S. LUNDIN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed October 8, 1959.

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[Title of District Court and Cause.]

## ORAL DECISION

Transcript of Oral Decision by the Honorable William J. Lindberg, a United States District Judge, upon motion of defendant for summary judgment in the above-entitled and numbered cause,

on the 21st day of October, 1959, at Seattle, Washington.

Appearances:

R. STUART THOMSON,
Appeared for and on behalf of the Plaintiff; and

GEORGE S. LUNDIN,
Assistant United States Attorney, Western District of Washington,
Appeared for and on behalf of the Defendant.

Whereupon, the following proceedings were had, to wit:

Proceedings

(Whereupon, argument for and on behalf of the respective parties on motion of defendant for summary judgment having been made by their respective counsel, the following proceedings were then had, to wit:)

The Court: Well, gentlemen, I have examined this, as I say, and your briefs and also the exhibits pretty carefully and I feel I can decide the matter now by virtue of your stipulation and it seems to me the facts as stipulated are as they appear in the file and are without dispute so that there is apparently no dispute as to a material factual issue with respect to the question of jurisdiction.

Now, as I view it here the claim made upon the government under the complaint for damages is based upon an alleged breach of contract involving issues which are of a factual nature. Granting that an issue of law may also arise, the interpretation of the contract resolving such issue cannot be ascertained or a decision of that issue cannot be reached without determining an issue of fact.

With respect to the issue of delay, it is alleged that and agreed that the plaintiff bases its claim upon the failure of the government to timely inspect the pilings and other area after the ramp had been removed; that is, within a reasonable time. The time or days of delay, of course, are agreed.

Now, whether that delay was an unnecessary one or an unreasonable one I do not believe can be decided as a question of law without resolving the factual issues. Further, whether or not damage resulted to the plaintiff from such delay also involved a factual issue.

It is my conclusion that under the provisions of the dispute clause, namely section 57, those factual issues must be presented and determined not only by the contracting officer but also, if adverse to claimant, an appeal from such decision, even if made without considering the facts or making a factual finding, must be prosecuted. That admittedly was not done and under the terms of the dispute clause the plaintiff is foreclosed.

Therefore, I feel that the court must grant the motion for summary judgment.

I do so somewhat reluctantly because I feel in

some of these cases at least the contractors are foreclosed from possible relief because they may not have been fully aware of the obligation upon them to avail themselves of the administrative remedies, but that is the result of the fact that although the government has permitted the suing of itself it still retains, under the old principle, the rights of a sovereign and when Congress grants the right it grants it with conditions and those who sue the government must comply with the requirements before they may prevail in an action in court.

Therefore, the court will grant the motion.

I don't think it is necessary to make findings of fact in this case. I think, however, that the order should recite the grounds upon which it is granted.

Mr. Lundin: Yes, your Honor.

Mr. Thompson: Yes, your Honor, I think that is a good idea.

The Court: Very well. The court will recess until tomorrow morning at ten o'clock.

(Whereupon, at 3:28 o'clock p.m., October 21, 1959, hearing in the within-entitled and numbered cause was adjourned.)

Reporter's Certificate

I, Earl V. Halvorson, official court reporter for the United States District Court for the Eastern and Western Districts of Washington, do hereby certify that the foregoing is a true and correct transcript of an extract of proceedings had in the within-entitled and numbered cause on the date herein-

before set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed October 22, 1959.

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[Title of District Court and Cause.]

## MOTION FOR RECONSIDERATION AND FOR ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT NOT WITHSTANDING COURT'S ORAL DECISION

Plaintiff moves for reconsideration of the court's oral decision in favor of defendant on the motion for summary judgment and in support of its motion submits the following:

The motion in the above-entitled action ultimately turned on the question of whether the Contracting Officer, in his letter of March 31, 1958, denied the claim solely as a matter of law or as a mixed question of law and fact. It was the opinion of the court that a mixed question of law and fact was involved. It is the contention of the plaintiff that the letter of March 31, 1958, only recited a conclusion of law, that there were no findings of fact hence the plaintiff could take the matter directly into District Court. The reasonableness or unreasonableness of the delay is not before the court at this time but

would be resolved after the motion for summary judgment has been settled. It seems very clear that where a Contracting Officer has denied a claims as a matter of law and left certain factual problems unsettled that the plaintiff would be required to continue to exhaust his administrative remedies, if he could ascertain what findings of fact the Government was making, and then much later return to the District Court to have the matter of law settled, as the court would suggest in this case.

The following cases were cited in plaintiff's trial brief or at the bottom of his supplement to plaintiff's trial brief. It is believed the cases are so decisive upon the question upon which the case turned that the court should have them fully briefed. The granting of the motion for summary judgment will be in conflict with the holdings of these cases and in particular with the case of Allied Contractors vs. United States, infra.

* * *

There is another reason why the United States District Court has jurisdiction over this case. The claim is for unliquidated damages caused by a breach of contract. Such a claim would have been subject to a motion for dismissal even if an appeal had been taken from the decision of the Contracting Officer. In an article in the Practical Lawyer (Published by the joint American Law Institute-American Bar Association Committee on Continuing Legal Education) Vol. 4-No. 6, October, 1958, entitled

"How To Deal With The Navy In The Field Of Business Law" p. 50 it is said:

"Thus, of the two kinds of claims possible under government contracts, those arising under the contract must by virtue of the Disputes clause, be presented to the contracting officer, and on appeal to the ASBCA (Armed Services Board of Contract Appeals). Claims for breach of contract may not be determined by the contracting officer or the ASBCA and can be allowed only by the Court of Claims, or, if for less than $10,000, by an appropriate District Court. The two kinds of claims are mutually exclusive: claims arising under the contract can be determined only within the Department of Defense, and claims for breach of it can be determined only by tribunals outside the Department."

To illustrate this matter attention is directed to Paragraph 1972—Gustav Hirsch Organization, Inc., which was a hearing before the Board of Contract Appeals, cited 58-2 BCA, October 30, 1958.

The appellant filed an appeal from a letter decision of the contracting officer which dismissed five claims for additional compensation as being claims for unliquidated damages, based upon alleged delays by the Government in meeting its obligations under the contract, which he had no authority to entertain and settle under the terms of the contract.

There was some discussion over the fact that the appellant hadn't appealed within 30 days as required by the disputes clause but then the Board went on to say:

"It seems to the Board that the motion to dismiss

for lack of jurisdiction should be granted in the instant case, although not on the ground advanced by the Government. Paragraph 23 of the Special Conditions of the specifications provided that certain materials described therein would be furnished by the Government for use by the contractor in performance of work under the contract, and set forth an 'estimated delivery date' for most of the categories of materials described. Other provisions of the specifications provided for the furnishing or approval by the Department of drawings for use by the contractor in performing the contract work. The instant claims, which are based solely on the alleged unreasonable or otherwise improper delays of the Government in furnishing certain of the materials and drawings, would not, if proven, come within the purview of any of the contract provisions, such as the "changes" and "changed conditions" clauses, that permit the allowance of equitable adjustments in the contract price by administrative action, but would amount to claims for damages for breach of contract. It is well settled that claims of this type are beyond he jurisdiction of either the contracting officer or the Board to consider and settle such a contract as the present (cases cited). This is the only valid reason, however, for the Board's lack of jurisdiction. The scope of the 'disputes' clause is limited by its own terms to disputes 'concering a question of facts arising under this contract.' In the appeal of D. R. Haddox, IBCA-84 (July 19, 1957), the Board held that an appeal relating to a matter outside the 'disputes' clause was not subject to the 30

day limitation and the rationale of that decision is equally applicable to cases involving only questions of law. The question presented in the instant case, is, of course, one of law."

The courts attention is directed to Exhibits "C," "G" and "I."

Respectfully submitted,

/s/ R. STUART THOMSON,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 27, 1959.

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[Title of District Court and Cause.]

## MEMORANDUM OPINION DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff has moved for reconsideration of the court's oral decision granting defendant's motion for summary judgment.

It is the contention of plaintiff that the letter of the contracting officer under date of March 31, 1958, Exhibit 1, only recited a conclusion of law without findings of fact of any kind and that therefore the plaintiff need not appeal the decision as provided in the disputes clause but may immediately seek relief in the district court.

Plaintiff relies primarily on the case of Allied Contractors vs. United States, 124 F. Supp. 366, although other cases are cited. While the Allied Contractors case may appear to support plaintiff's contention, it is my view that in so far as it does it is not in accord with the law as expressed by the Supreme Court in United States vs. Blair, 321 U.S. 730 and United States vs. Holpuch Co., 328 U.S. 234. Further, it would appear that the Court of Claims in its more recent decisions has failed to follow the pattern of the Allied Contractors case; see Henry E. Wile Company vs. United States, 169 F. Supp. 249 at page 252.

Also a careful study of the Allied Contractors case clearly indicates that it is distinguishable from the problem here presented. There, plaintiff had a contract with the government which admittedly required the government to follow a certain sequence with respect to its part in the contract. The government failed to follow that sequence and as a result (1) it took plaintiff additional time to complete the work required, and (2) plaintiff had to keep rented equipment idle. Plaintiff put in two claims as stated. The first was granted and the second denied for the reason that the claim amounted to a claim for damages for breach of contract (not cognizable administratively). Both claims were based upon the same undisputed fact. See page 368:

> "The defendant concedes * * * that defendant did not follow the sequence of work as set forth * * *"

page 369:

> "Both claims were founded on defendant's failure to follow the sequence of work * * *
>
> "(1) It is clearly apparent from the evidence that defendant breached the contract * * *."

and page 370:

> "The remainder of plaintiff's claim * * * was denied * * * on the ground that it was a claim for unliquidated damages for breach of contract, notwithstanding the fact that both of plaintiff's claims * * * were founded on defendant's failure to follow the sequence * * * The letter * * * upon which defendant relies, refers to the June 27, 1949, letter and appears to be no more than an affirmation of that decision <u>which clearly was not decided on a question of fact</u>." (Emphasis supplied.)

Here it is not conceded that the government conducted the inspection in such a way as to unduly delay the work. To the contrary, the government insists that it conducted the inspection with all reasonable dispatch and further that the delay was caused by unforeseen circumstances. These contentions presented the factual dispute which the administrative agency should have first resolved.

It is true that the court goes on with this language:

> "No findings of fact were made by the contracting officer. Even if the August letter is con-

> sidered by itself the most that can be said for defendant is that it is ambiguous. Certainly if the contracting officer's decision is to be accorded finality it should be unequivocal and clear enough to apprise plaintiff of whether it was based on a question of fact or law so that plaintiff can reasonably determine whether an appeal is warranted. When the decision is ambiguous, as the August letter is, we must look to surrounding circumstances to determine its meaning."

This language may suggest that if a contracting officer made a decision which recited that he finds as a matter of law that a contractor's claim must be denied, the contractor would be warranted in ignoring the appeal provisions. But it should be noted that the last part of the above-quoted language indicates that if the officer's decision is ambiguous surrounding circumstances must be considered. The court went on to state:

> "In so doing (looking at the surrounding circumstances) we conclude that the contracting officer's decision was based on a question of law and, therefore, it was unnecessary (to appeal)." (Parenthetics supplied.)

A contractor cannot hold the contracting officer's letter up in the abstract. He has to consider the nature of his claim. And, as here, if the surrounding circumstances indicate that the decision is based on facts as well as law appeal would be necessary. The opinion of the contracting officer that the issue

involved was one of law rather than fact does not make it such.

A further review of the matter upon plaintiff's motion to reconsider does not convince me that I was in error in concluding that defendant's motion for summary judgment should be granted.

Dated November 16, 1959.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed November 16, 1959.

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[Title of District Court and Cause.]

STIPULATION

Plaintiff and defendant hereby stipulate the following facts for pretrial purposes only, said stipulation not being binding upon either party at trial unless further agreed:

I.

That prior to the bid of plaintiff on the contract underlying the subject action (attached hereto as Exhibit "A"), neither plaintiff nor defendant knew of a buildup of silt, sand and other materials under ramps B and C which was later discovered by plaintiff.

II.

That prior to learning of the buildup of said materials under ramps B and C, neither plaintiff nor defendant expected or anticipated that the required

independent Engineering Service Contract for underwater inspection would take longer than three (3) or four (4) days for each ramp.

III.

That inspection of underwater conditions at ramp B commenced on July 8, 1959, as requested by plaintiff. That because of the buildup of said materials under the ramps, the Engineering Service contractor worked July 8, 9, 10, 11 and 31, and August 1, 2, 5 and 6, 1957, inclusive, to complete the inspection of ramp B. Subsequently, more extensive inspection work was required on ramp C than earlier anticipated.

IV.

That subsequent to the completion of the inspection of ramp B, the officer-in-charge of construction at Seattle, Washington took two (2) days to receive and evaluate the construction report and determine which piles should be replaced.

V.

That after determination that changes were necessary in the Engineering Service Contract, a period of thirteen (13) work days ensued from July 12, to July 30, 1957, inclusive, during which time funds were obtained and authorization secured, both from Washington, D. C., for the additional inspection work necessary.

VI.

That because of the additional time required for the underwater inspection, plaintiff was prevented

from completing his work on his contract in the manner plaintiff then desired with some claimed additional resultant expense.

VII.

That on July 23, 1957, plaintiff forwarded a letter (attached as Exhibit "B") to the Navy, which was received July 24th.

VIII.

That subsequently, inspection was completed and the plaintiff finished its work under the contract (Exhibit "A") including two (2) contract amendments which added to the time for performance and compensation of plaintiff.

IX.

That on November 12, 1957, plaintiff forwarded a claim for rentals and wages lost due to delays in substructure inspection to the Resident Officer-in-Charge of Construction, Oak Harbor, Washington (Exhibit "C").

X.

That on November 15, 1957, said resident officer-in-charge of construction wrote plaintiff a letter (Exhibit "D") referencing certain portions of the contract.

XI.

That on December 4, 1957, plaintiff filed a claim (Exhibit "E") with the Officer-in-Charge of Construction, Thirteenth Naval District, Seattle, Washington.

XII.

That on January 14, 1958, plaintiff filed a release (Exhibit "F") upon payment under the contract except for its claim of December 4, 1957.

XIII.

That on January 28, 1958, the Officer-in-Charge of Construction, Thirteenth Naval District, denied plaintiff's claim by letter (Exhibit "G").

XIV.

That on February 18, 1958, plaintiff presented his claim by letter (Exhibit "H") to the contracting officer in accordance with terms of contract.

XV.

That on March 31, 1958, the contracting officer denied plaintiff's claim by letter (Exhibit "I").

XVI.

That plaintiff has made no appeal under the contract of the contracting officer's decision.

Dated this 30th day of September, 1959.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GEORGE S. LUNDIN,
Assistant United States Attorney, Counsel for Defendant.

/s/ R. STUART THOMSON,
Counsel for Plaintiff.

[Endorsed]: Filed October 8, 1959.

United States District Court, Western
District of Washington, Northern Division

No. 4686

McCRAY MARINE CONSTRUCTION CO.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## ORDER

The defendant bringing on its motion for summary judgment in open court on October 21, 1959; the court having heard arguments from counsel for both parties and the court having examined the briefs submitted concerning this court's jurisdiction to try and determine the above-entitled action when the plaintiff failed to exhaust its administrative remedies as required under the contract underlying said action; and the court finding that plaintiff's allegations that the defendant breached its contract with plaintiff involved questions of a factual nature whether plaintiff was unnecessarily or unreasonably delayed by defendant and whether damage resulted to plaintiff from any delay; and the court finding further that such factual issues must be presented and determined not only by the contracting officer, but also, if adverse to plaintiff on appeal under the disputes clause of said contract even if said contracting officer's decision was made without consideration of the facts or without a factual finding by

the contracting officer; and it appearing beyond question that the plaintiff failed and neglected to pursue its administrative remedies as required, this court does find that it has no jurisdiction to try and determine this action.

Considering said findings, this court now therefore does grant defendant's motion for summary judgment and orders the above-entitled case dismissed with prejudice.

Dated November 17, 1959.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved and Presented:

/s/ GEORGE S. LUNDIN,
Assistant United States Attorney, Counsel for Defendant.

Approved as to Form:

/s/ R. STUART THOMSON,
Counsel for Plaintiff.

Lodged October 23, 1959.

[Endorsed]: Filed November 17, 1959.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is hereby given that McCray Marine Construction Company, the above-named plaintiff,

hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order granting defendant's motion for summary judgment of dismissal entered in this action on November 17, 1959.

Dated this 18th day of November, 1959.

/s/ R. STUART THOMSON,
Attorney for Appellant.

[Endorsed]: Filed November 19, 1959.

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[Title of District Court and Cause.]

## BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That McCray Marine Construction and A. Walter McCray, owner, as principal, and Continental Casualty Company, an Illinois corporation, as surety, are held and firmly bound unto the defendant, United States of America, in the full and just sum of $250.00, to be paid to the defendant, United States of America, to which payment will and truely be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of November, 1959.

Whereas on November 17, 1959, in an action pending in the United States District Court for the Western District of Washington, Northern Division, between McCray Marine Construction Company, as

plaintiff and the United States of America, as defendant, an order granting defendant's motion for summary judgment of dismissal was rendered against the said McCray Marine Construction Company and the said McCray Marine Construction Company having filed a notice of appeal from such district court to the United States Court of Appeals for the Ninth Circuit;

Now, therefore the condition of this obligation is such that if the said McCray Marine Construction Company shall prosecute its appeal to effect and shall pay costs if the appeal is dismissed or the order affirmed, or such costs as the said Court of Appeals may award against said McCray Marine Construction Company if the judgment is modified, then this obligation to be void; otherwise remain in full force and effect.

McCRAY MARINE
CONSTRUCTION,

By /s/ A. WALTER McCRAY,
Owner.

[Seal] CONTINENTAL CASUALTY
COMPANY,

By /s/ RALPH B. CHAMBERLAIN,
Its Attorney-in-Fact.

State of Washington,
County of King—ss.

On November 20, 1959, before me personally came Ralph B. Chamberlain, who being by me duly sworn

deposes and says, that he resides in the City of Seattle, State of Washington, and that he is the Attorney-in-Fact of the Continental Casualty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Illinois; that the seal affixed to the above bond is the corporate seal of the said Continental Casualty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-Fact of said Company; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatever, by more than the sum of $50,000.

[Seal] /s/ R. STUART THOMSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Lodged November 23, 1959.

[Endorsed]: Filed December 4, 1959.

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[Title of District Court and Cause.]

## STATEMENT OF POINTS

Plaintiff-appellant presents the following points upon which he claims the trial court erred:

(1) In a failure to find that the final decision of the Contracting Officer, recited in a letter dated March 31, 1958, was based on a question of law.

(2) In a failure to rule that an administrative appeal is not required, under Section 57 of the contract in question, from the decision of the Contracting Officer, which is based on a question of law, and even if required, the 30 day appeal period prescribed for disputes of fact would not be applicable but an appeal could be taken within a reasonable time.

(3) In ruling that potential factual issues, undisputed prior to or at the Contracting Officer's level, must nevertheless be appealed within 30 days to the Secretary of the Navy in accordance with Section 57 of the contract pertaining to disputes of fact or the claim will fail for failure to exhaust ones administrative remedies.

(4) In assuming that the Contracting Officer's final decision of March 31, 1958, was ambiguous without so finding or in what respect.

(5) After apparently concluding the Contracting Officer's letter of March 31, 1958, was ambiguous, in failing to consider only those circumstances existing on March 31, 1958, the time when the decision was made, and, on the other hand, in considering contentions first made at a much later date in the answer, specifically, paragraph IV, line 7, page 2 where the defendant answered:

> "Defendant further avers that inspection of the substructure of ramps 'B' and 'C' was accomplished with all due diligence after plaintiff advised work was not being performed according to schedule by plaintiff. Defendant asserts

> that certain delays are inherent in underwater inspection and should have been foreseen by plaintiff."

in determining whether the Contracting Officer's decision was based on a question of law or fact or both.

(6) In failing to find that the surrounding circumstances existing on March 31, 1958, revealed the Contracting Officer based his decision, in denying the plaintiff's claim, on a question of law.

(7) In a failure to find that the United States District Court had jurisdiction over a claim for unliquidated damages against the United States of America regardless of whether the claim was presented for administrative consideration or whether any appeal was taken from an adverse administrative decision on a matter which it could not legally consider.

(8) In signing the order granting defendant's motion for summary judgment because the plaintiff had not exhausted the administrative remedies available and dismissing plaintiff's complaint with prejudice.

/s/ R. STUART THOMSON,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 14, 1959.

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP, and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the action, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Sept. 26, 1958.

4. Answer of defendant, filed Jan. 15, 1959.

22. Motion defendant for Summary judgment, filed Dec. 14, 1959.

24. Stipulation of facts with exhibits A, B, C, D, E, F, G, H, and I attached, filed Oct. 8, 1959.

30. Court Reporter's Transcript of Court's Oral Decision, filed 10-22-59.

31. Motion for Reconsideration and for Order Denying Defendant's Motion for Summary Judgment Notwithstanding Court's Oral Decision, filed 10-27-59.

32. Memorandum Opinion Denying Plaintiff's Motion for Reconsideration, filed Nov. 16, 1959.

33. Order granting Defendant's Motion for Summary Judgment and Dismissal of case with prejudice, filed Nov. 17, 1959.

34. Notice of Appeal, filed Nov. 19, 1959.

35. Bond for Costs on Appeal, filed Dec. 4, 1959.

36. Designation of Contents of Record on Appeal, filed Dec. 14, 1959.

37. Statement of Points, filed Dec. 14, 1959.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00; and that said amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 18th day of December, 1959.

[Seal] HAROLD W. ANDERSON,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 16728. United States Court of Appeals for the Ninth Circuit. McCray Marine Construction Company, Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 21, 1959.

Docketed: December 31, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.